Supreme Court, U.S.
FILED

09-536 AUG 19 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

No. ____

In The

Supreme Court Of The United States

EDWARD BURKE, III,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner
Edward Burke, III

QUESTION PRESENTED FOR REVIEW

Whether the Defendant's waiver of his appellate rights is invalid and unenforceable?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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CITATIONS TO OPINION AND ORDER BELOW

The decision of the Court of Appeals for the Second Circuit is not reported. (Petitioner's Appendix A, p. A1) (hereinafter "Pet. App.").

BASIS FOR JURISDICTION

The decision of the Court of Appeals for the Second Circuit granting the Government's Motion to Dismiss was issued on June 9, 2009. See Pet. App. A, p. A1). The decision was issued as mandate on July 9, 2009. Id.

The Petitioner is relying on Rules 10 et seq. of the Rules of the Supreme Court of the United States in filing this petition. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(a) ("Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree....").

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV:

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction

This petition raises an important federal question as to whether the Petitioner's waiver of his appellate rights was invalid and whether his plea, conviction and sentence violated the Double Jeopardy and Due Process Clauses of the United States Constitution.

B. Facts Material To The Consideration Of The Question Presented

This case presents a very unique situation in which, waiving indictment, the Petitioner, Edward Burke, III, pled guilty to one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) pursuant to a plea agreement letter dated October 5, 2007. The uniqueness of this case is found in the fact that prior to pleading guilty in the district court, the Petitioner had already been convicted of and sentenced for ***the very same offense*** in the superior court of the State of Connecticut.

On June 28, 2006, the Petitioner pled guilty in the Superior Court for the State of Connecticut, Judicial District of Hartford, before the Honorable Thomas Miano to possession of child pornography and was sentenced to a term of imprisonment of ten years, execution suspended, and five years of probation. Special conditions of the Petitioner's state probation included sex offender treatment and probation, substance abuse evaluation and treatment, performance of 300 hours of community service, a fine of $5,000.00, and the requirement that he make a $1,000.00 donation to the victims' services

commission each year of the last four years of his probation.

Notwithstanding the Petitioner's prosecution in state court, in an extremely rare move, the Government sought and obtained a waiver of the Petite policy that was first enunciated in Petite v. United States, 361 U.S. 529 (1960),[1] paving the way for the successive, dual prosecution of the Petitioner in federal court. This Petite waiver was obtained after much public outcry regarding Judge Miano's pronouncement of a suspended sentence in state court.

The Government indicated that its rationale behind securing a Petite waiver was the fact that the Petitioner received inadequate punishment in state court. See Pet. App. at 5 (Excerpt of Transcript of Waiver of Plea, Nov. 6, 2007). The Government also contended that the state court judge did not understand the offense adequately when sentencing the Petitioner in state court. Id.

The Petitioner was subsequently prosecuted in federal court and was sentenced on November 12,

---

[1] The Petite policy is a federal policy adopted by the Attorney General which bars a federal trial following a state prosecution for the same acts "unless the reasons are compelling." United States v. Grimes, 641 F.2d 96, 101 n.17 (3d Cir. 1981) (quoting Dep't of Justice Press Release, Apr. 6, 1959)). "This federal policy, which also encompasses successive federal prosecutions arising out of the same transaction, was recognized by the [United States Supreme] Court in Petite v. United States ...." Id.

2008 to a term of imprisonment of thirty-seven months and five years of supervised release.

After the Petitioner's sentencing, new counsel appeared for the Petitioner and filed a Motion to Amend/Correct Judgment and for Resentencing. In that Motion, the Petitioner argued that the judgment should be amended or corrected to reflect the fact that the prosecution of the Petitioner in federal court, after he had already been convicted of the identical offense in state court, was unconstitutional. Pet. App. at 10 (Excerpt of Transcript of Motion Hearing, Dec. 9, 2008). At the hearing on said motion, the Petitioner argued:

> First of all, we ask the Court not to sign the judgment because we're claiming the whole proceeding's unconstitutional. ... [B]ut if [the Court] does sign the judgment, it should contain language that the Court rejects the arguments that are advanced, in general terms, in our motion, namely the proceeding is unconstitutional....

Id.

The trial court denied the Petitioner's Motion to Amend/Correct Judgment and for Resentencing. The trial court stated that the Petitioner's federal court conviction did not violate the Double Jeopardy Clause of the United States Constitution because of the doctrine of dual sovereignty.

Thereafter, the Petitioner appealed to the Second Circuit. After the filing of the Petitioner's

appellate brief to the Second Circuit, the Government moved to dismiss the appeal, arguing that the Petitioner had entered into a valid waiver of his appellate rights as part of his plea agreement. The Petitioner filed an opposition to the Motion to Dismiss. The Second Circuit dismissed the appeal, ruling that the Petitioner had not demonstrated that the waiver of his appellate rights was unenforceable. See Pet. App. at 1-2 (Second Circuit Decision granting Government's Motion to Dismiss). As such, the Petitioner's appeal was not considered on the merits.

ARGUMENT AMPLIFYING THE REASONS FOR GRANTING THE WRIT

This Petition for Writ of Certiorari should be granted because the Second Circuit Court of Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court and because the Supreme Court has not directly ruled on the issue of the validity of appellate waivers. Therefore, the Petition for Writ of Certiorari should be granted.

Although this Court has not directly ruled on the issue of appellate waivers, the Court has ruled in other contexts that in order for a right to be validly waived, the waiver must be knowing and intelligent. See, e.g., Sanchez-Llamas v. Oregon, 548 U.S. 331, 361 (2006) (Ginsburg, J., concurring) ("[A] defendant's waiver of Miranda rights must be voluntary, knowing and intelligent, i.e., the product of a free and deliberate choice ... made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.") (internal quotations omitted); United States v. Ruiz, 536 U.S. 622, 628 (2002) ("Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is voluntary and that the defendant must make related waivers knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.") (internal quotations omitted). A waiver of a criminal defendant's right to appeal cannot be considered knowing or intelligent when the waiving party is not informed or aware of the fact that he has a valid basis to appeal and, in fact, is informed of the direct

opposite. See United States v. Mendoza-Lopez, 481 U.S. 828, 842 (1987).

In Mendoza-Lopez, this Court denounced the scenario where a party is "deprived of their rights to appeal, and of any basis to appeal since the only relief for which they would have been eligible **was not adequately explained to them**." Id. (emphasis added); see also United States v. Brown, 148 F.Supp.2d 191, 200 (E.D.N.Y. 2001) ("[Brown] ... did not understand that he had 'any basis to appeal,' and his waiver of his right to appeal was neither considered nor intelligent. ... Brown's waiver of his right to appeal was not considered and intelligent ... because Brown did not comprehend the basis for an appeal ....") (abrogated on other grounds, United States v. Garcia-Jurado, 281 F.Supp.2d. 498 (E.D.N.Y. 2003)).

The scenario presented in Mendoza-Lopez is similar to that in the present case. In this matter, the Second Circuit Court of Appeals was presented with an affidavit executed by the Petitioner in support of his opposition to the Government's Motion to Dismiss, in which the Petitioner averred that he was not told that he had any grounds to challenge the constitutionality of his conviction. See Pet. App. at 11-12 (Affidavit of Edward Burke). Indeed, the Petitioner was specifically told the exact opposite – that no basis to appeal existed. Id.; see also Pet. App. at 7 (Excerpt of Transcript of Waiver of Plea, Nov. 6, 2007) ("Your Honor, Mr. Maxwell and I have met extensively with Mr. Burke, and we've explained the concept of [a] [P]etite waiver. **We understand there's nothing we can do about that**. ... [A]nd we've explained to him that the government wishes to

proceed in this fashion, **there's no legal impediment that we can see**.") (emphasis added).

As argued at length in the Petitioner's appellate brief on the merits to the Second Circuit Court of Appeals, there is a good faith basis to argue that the Petitioner's prosecution, conviction and sentence violate the Double Jeopardy Clause of the United States Constitution because several Supreme Court Justices as well as Circuit Judges and legal scholars have criticized the ongoing viability and constitutionality of the dual sovereignty doctrine and have argued that the doctrine should be reexamined and abolished. See Pet. App. at 27-50 (Petitioner's Appellate Brief). Had the Petitioner known of this good faith argument to advance on appeal, he would not have entered into the appeal waiver. See Pet. App. at 11-12 (Affidavit of Edward Burke). The Petitioner's appellate waiver cannot be considered knowing or intelligent because it was not explained to him that he had a valid claim that could be advanced on appeal and, thus, he did not "comprehend the basis for an appeal." See United States v. Mendoza-Lopez, 481 U.S. at 842; United States v. Brown, 148 F.Supp.2d at 200; see also United States v. Taylor, 139 F.3d 924, 931 (D.C. Cir. 1998) (defendant could not form valid appellate waiver because he did not know of the particular error at the time he entered into the plea agreement). Also, the Petitioner's decision was not made "with a full awareness of ... the consequences of the decision to abandon" his right to appeal. Sanchez-Llamas v. Oregon, 548 U.S. at 361. The Petitioner's decision additionally was not made "with sufficient awareness of the relevant circumstances and likely consequences." United States v. Ruiz, 536 U.S. at 628.

Further, the circumstances surrounding Petitioner's appellate waiver demonstrate that his right to fundamental fairness as guaranteed by the Due Process Clause of the United States Constitution was violated. Fundamental fairness is violated when a criminal defendant does not understand the consequences of the choices that he makes. United States v. Mendoza-Lopez, 781 F.2d 111, 113 (8th Cir. 1985), aff'd, 481 U.S. 828 (1987); see also Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969) (holding in criminal context that, "if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void .... [The plea] cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.").

As discussed supra, in the present matter, the Petitioner was not informed that there was a good faith basis to challenge the constitutionality of his prosecution, conviction and resulting sentence. As such, he did not possess "an understanding of the law in relation to the facts," and he did not understand the consequences of his choice. See Boykin v. Alabama, 395 U.S. at 243 n.5; United States v. Mendoza-Lopez, 781 F.2d at 113. Thus, the Petitioner's guilty plea, which included the appellate waiver, cannot be considered voluntary and knowing, and is in violation of the fundamental fairness guaranteed by the Due Process Clause.

For these reasons, the Second Circuit incorrectly ruled that the Petitioner failed to demonstrate that his appellate waiver was invalid. To ensure that the Petitioner's rights under the Double Jeopardy and Due Process Clauses are protected, this Court should grant certiorari in this matter.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit should be granted.

THE PETITIONER,
EDWARD BURKE, III

BY /s/

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51 Russ Street
Hartford, Connecticut 06106
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Date: October 22, 2009

No. _____

In The

Supreme Court Of The United States

EDWARD BURKE, III,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

D. Conn
07-cr-271
Nevas, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 9th day of June, two thousand nine,

Present:

Hon. Guido Calabresi
Hon. Robert D. Sack,
Circuit Judges,
Hon. Edward R. Korman,*
District Judge.

United States of America,
Appellee,

v. 08-6150-cr

Edward Burke, III,
Defendant-Appellant.

The Government moves to dismiss this appeal as barred by the waiver of appellate rights contained in Appellant's plea agreement. Upon due consideration, it is hereby ORDERED that the motion is GRANTED and the appeal is DISMISSED. Appellant has not demonstrated that the waiver of his appellate rights is

unenforceable under *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000). We decline to reach the ineffective assistance of counsel claim on this appeal as it is not based on the existing record before this Court. See United States v. Wellington, 417 F.3d 284, 288 (2d Cir. 2005).

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk

By: /s/
Richard Alcantara, Deputy
Clerk

---

*The Honorable Edward R. Korman, Senior Judge of the United States District Court for the Eastern District of New York, sitting by designation.

ISSUED AS MANDATE: 7-9-09

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	Case No. 3:07-CR-: 00271 (AHN)
Plaintiff,	:	
	:	Bridgeport, Connecticut
	:	November 6, 2007
v.	:	
EDWARD BURKE, III,	:	
Defendant.	:	

.....

CHANGE OF PLEA HEARING
BEFORE THE HONORABLE
ALAN H. NEVAS
SENIOR UNITED STATES
DISTRICT JUDGE

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For Probation: U.S. Probation Office
By: RAYMOND LOPEZ, SUSPO
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157 Church Street
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Electronic Court Reporter Operator: MS. RITA PAYTON

Proceedings recorded by electronic sound recording.
Transcript prepared by transcription service.

BOWLES REPORTING SERVICE
P.O. BOX 607
GALES FERRY, CONNECTICUT 06335
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EXCERPT OF TRANSCRIPT:

.....

THE COURT: He pled guilty in state court. Where was that?

MR. JONGBLOED: It was –

MR. MAXWELL: Hartford Judicial District.

THE COURT: In Hartford, got a suspended sentence?

MR. JONGBLOED: Got no time. Yes, Your Honor, got a probationary sentence.

THE COURT: And so what you're saying is United States attorney's office believe that that was inadequate punishment?

MR. JONGBLOED: Yes, Your Honor. We – Government – The request the government made of the department, to get a petite waiver, was that the federal interests were not adequately vindicated by a probationary sentence, particularly when – if Your Honor looks at – If Your Honor would look at – I read the grand jury – the transcript of the sentencing hearing, and the state court judge didn't understand . He said it was one of his first cases involving child pornography, didn't quite understand – didn't understand the offense, and didn't quite understand why he should punish someone as though they actually victimized children.

So, in the government's view of probationary sentence, based on the nature of the images, as described in both the Information – as described in the stipulation to the Plea Agreement, in the government's view, these images are obscene, violent acts against children, and felt as though the government's interests and the interests of the United States of America wasn't vindicated by a sentence of probation.

THE COURT: And there is a petite waiver?

MR. JONGBLOED: There is, Your Honor.

THE COURT: Well, Mr. Burke, you just heard the prosecutor explain why this matter is proceeding here in federal court.

I can understand your, perhaps, confusion, but after that explanation, do you now understand why the matter is proceeding in federal court?

THE DEFENDANT: Yes, I do.

THE COURT: Are you still confused?

THE DEFENDANT: No, I understand.

THE COURT: Mr. Norris?

MR. NORRIS: Yeah.

Your honor, Mr. Maxwell and I have met extensively with Mr. Burke, and we've explained the concept of petite waiver. We understand there's nothing we can do about that.

If the government chooses to proceed here, obviously, we'll be making, on behalf of Mr. Burke, many, many arguments with respect to this matter, but we understand that with respect to the issue of the government, once they get the petite waiver, as the Court knows, he's already pled guilty in state court, so he's already admitted his guilt. There's no issues to contest. He's acknowledged his responsibility to this very conduct in state court at an earlier occasion, and we've explained to him that the government wishes to proceed in this fashion, there's no legal impediment that we can see. However, we're not precluded in the Plea Agreement, to raise all of the arguments which we will intend to do on his behalf with respect to how this Court should treat this matter.

.....

END OF EXCERPT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	Case No. 3:07-CR-: 00271 (AHN)
Plaintiff,	:	
	:	Bridgeport, Connecticut
	:	December 9, 2008
v.	:	
	:	
EDWARD BURKE, III,	:	
	:	
Defendant.	:	

.....

MOTION HEARING
BEFORE THE HONORABLE
ALAN H. NEVAS
SENIOR UNITED STATES
DISTRICT JUDGE

APPEARANCES:

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Electronic Court
Reporter Operator: MS. RITA PAYTON

Proceedings recorded by electronic sound recording.
Transcript prepared by transcription service.

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(860) 464-1083

EXCERPT OF TRANSCRIPT:

.....

MR. SANTOS: The remedy we're looking for is that the judgment – to the extent the Court is going – that I – First of all, we ask the Court not to sign the judgment because we're claiming the whole proceeding's unconstitutional.

There's no provision, as Your Honor knows, in the rules, to permit a withdrawal of a guilty plea after sentencing. The only remedy would be a writ of habeas corpus, but what I'm saying to the Court, since we're at this stage, the Court now being alerted to the argument that never was made to the Court, that this whole proceeding is unconstitutional, should not sign the judgment, but if it does sign the judgment, it should contain language that the Court rejects the arguments that are advanced, in general terms, in our motion, namely the proceeding is unconstitutional, –

.....

END OF EXCERPT

AFFIDAVIT

I, Edward J. Burke, being first duly sworn, hereby depose and state:

1. I am over the age of 18 and believe in the obligation of an oath.

2. I was prosecuted in the Superior Court for the State of Connecticut for possession of child pornography, which matter was disposed of by plea. I was sentenced in state court on October 5, 2006.

3. Thereafter, the federal government instituted a prosecution of me for the very same offense.

4. I pled guilty in federal court and was sentenced to a period of incarceration on November 12, 2008.

5. Throughout the course of the federal proceedings, I was unaware that the prosecution and sentencing could be barred by the Double Jeopardy Clause of the United States Constitution or some other constitutional provision.

6. As part of my guilty plea in federal court, I gave up my right to appeal the conviction and sentence unless the sentence exceeded 63 months in prison.

7. I would not have waived my right to appeal if I had known that there was a reasonable basis to argue that the federal prosecution and sentencing violated the Double Jeopardy Clause or some other constitutional provision.

/s/
Edward J. Burke

Subscribed and sworn to before me, this 4th day of February, 2009

/s/
Hubert J. Santos

08-6150-cr

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDWARD BURKE, III,
Defendants-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE DEFENDANT-APPELLANT

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JURISDICTIONAL STATEMENT

This appeal arises out of a judgment of the District Court (The Honorable Alan H. Nevas, United States District Judge), dated December 10, 2008. The District Court's jurisdiction was premised upon 18 U.S.C. § 3231. The Defendant filed a timely notice of appeal in the District Court on December 17, 2008. This Court has jurisdiction over the Defendants' appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the prosecution of the Defendant violates the Double Jeopardy Clause of the United States Constitution.

STATEMENT OF THE CASE

This is an appeal from the judgment of conviction of Edward Burke III for possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). An Information and a Plea Agreement letter were filed on November 6, 2007.

The Defendant was sentenced on November 12, 2008. Thereafter, the Defendant filed several post-judgment motions, including a Motion to Amend/Correct Judgment on November 20, 2008, arguing that the prosecution of the Defendant violated the Double Jeopardy clause of the United States constitution and principles of federalism and that the judgment should be amended to reflect that fact. See Joint Appendix at A1 (hereinafter "JA __"). The Government filed an opposition on December 8, 2008. JA at A5. The district court, Nevas, J., denied the Defendant's Motion on December 10, 2008. JA at A15. On December 17, 2008, the Defendant filed a Notice of Appeal with the district court.

STATEMENT OF FACTS

This case presents a very unique situation in which, waiving indictment, the Defendant, Edward Burke, III, pled guilty to one count of possession of

child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) pursuant to a plea agreement letter dated October 5, 2007. The uniqueness of this case is found in the fact that prior to pleading guilty in the district court, the Defendant had already been convicted of and sentenced for ***the very same offense*** in the superior court of the State of Connecticut.

On June 28, 2006, the Defendant pled guilty in Hartford Superior Court before the Honorable Thomas Miano to possession of child pornography and was sentenced to a term of imprisonment of ten years, execution suspended, and five years of probation. Special conditions of the Defendant's state probation included sex offender treatment and probation, substance abuse evaluation and treatment, performance of 300 hours of community service, a fine of $5,000.00, and the requirement that he make a $1,000.00 donation to the victims' services

commission each year of the last four years of his probation.

Notwithstanding the Defendant's prosecution in state court, in an extremely rare move, the Government sought and obtained a waiver of the Petite policy that was first enunciated in Petite v. United States, 361 U.S. 529 (1960),[1] paving the way for the successive, dual prosecution of the Defendant in federal court. This Petite waiver was obtained after much public outcry regarding Judge Miano's pronouncement of a suspended sentence.

The Government indicated that its rationale behind securing a Petite waiver was the fact that the

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[1] The Petite policy is a federal policy adopted by the Attorney General which bars a federal trial following a state prosecution for the same acts "unless the reasons are compelling." United States v. Grimes, 641 F.2d 96, 101 n.17 (3d Cir. 1981) (quoting Dep't of Justice Press Release, Apr. 6, 1959)). "This federal policy, which also encompasses successive federal prosecutions arising out of the same transaction, was recognized by the [United States Supreme] Court in Petite v. United States ...." Id.

Defendant received inadequate punishment in state court. See Transcript of Waiver of Plea, Nov. 6, 2007, at 8 (hereinafter "Tr."). The Government also contended that the state court judge did not understand the offense adequately when sentencing the Defendant in state court. Id.

The Defendant was subsequently prosecuted in federal court and was sentenced on November 12, 2008 to a term of imprisonment of thirty-seven months and five years of supervised release.

After the Defendant's sentencing, he filed a Motion to Amend/Correct Judgment and for Resentencing. JA at A1. In that Motion, the Defendant argued that the judgment should be amended or corrected to reflect the fact that the prosecution of the Defendant in federal court, after he had already been convicted of the identical offense in state court, was unconstitutional. Id.; see also Tr.

Dec. 9, 2008, at 9. At the hearing on said motion, the Defendant argued:

> First of all, we ask the Court not to sign the judgment because we're claiming the whole proceeding's unconstitutional. ... [B]ut if [the Court] does sign the judgment, it should contain language that the Court rejects the arguments that are advanced, in general terms, in our motion, namely the proceeding is unconstitutional....

Tr. Dec. 9, 2008, at 9.

The trial court denied the Defendant's Motion to Amend/Correct Judgment and for Resentencing. JA at A15. The trial court stated that the Defendant's federal court conviction did not violate the Double Jeopardy Clause of the United States Constitution because of the doctrine of dual sovereignty. Id. at A17.

ARGUMENT SUMMARY

The Dual Sovereignty Doctrine, which permits successive prosecutions of a criminal defendant for the same actions in both state and federal court, should be reexamined. The Doctrine should be found unconstitutional as violative of the Double Jeopardy Clause because it improperly permits multiple punishments for the same offense. Numerous Supreme Court Justices as well as federal circuits and academic scholars have questioned the ongoing viability of this Doctrine. In view of principles of comity and federalism, as well as the United States Supreme Court's recent willingness to give new and serious thought to issues of federalism, the Dual Sovereignty doctrine should be found unconstitutional.

ARGUMENT

I. THE SUCCESSIVE PROSECUTION OF THE DEFENDANT VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION

A. History Of The Dual Sovereignty Doctrine

The Double Jeopardy Clause of the United States Constitution provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V. However, the Second Circuit has recognized, "The Double Jeopardy Clause is inapplicable when separate governments prosecute the same defendant, for the defendant has offended both sovereigns." United States v. 38 Whalers Cove Drive, 954 F.2d 29 (2d Cir.), cert. denied, 506 U.S. 815 (1992).

The dual sovereignty doctrine was first directly dealt with by the United States Supreme Court in United States v. Lanza, 260 U.S. 377

(1922).[2] The defendants in Lanza had been indicted federally for violating the National Prohibition Act after they had already been charged in state court in Washington for manufacturing, transporting and possessing the same liquor. Id. at 379. The defendants argued that two punishments for the same act, one under federal law and the second under state law, constituted double jeopardy under the Fifth Amendment. Id.

The Supreme Court disagreed, noting:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation

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[2] The Court had discussed the issue in three prior cases, Fox v. State of Ohio, 5 How. 410, 12 L.Ed. 213 (1847), United States v. Marigold, 9 How. 560, 13 L.Ed. 257 (1850), and Moore v. People of the State of Illinois, 14 How. 13, 14 L.Ed. 306 (1852), but acknowledged that the issue was first "directly presented" to the Court in United States v. Lanza, 260 U.S. 377. Abbate v. United States, 359 U.S. 187, 190-93 (1959).

> that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. ... Here the same act was an offense against the state of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against the state is not a conviction of the different offense against the United States, and so is not double jeopardy.

Id. at 382.

B. The Dual Sovereignty Doctrine Must Be Reexamined And Rejected As Unconstitutional

The district court's decision that the Defendant's prosecution did not violate the Double Jeopardy Clause was incorrect. The constitutionality of dual prosecutions has been criticized for some

time. As far back as 1959, three Supreme Court Justices, dissenting in Bartkus v. Illinois, 359 U.S. 121 (1959), stated that they believed that a federal prosecution following a state conviction should be barred by the Double Jeopardy Clause of the Fifth Amendment. Bartkus, 359 U.S. at 150 (Black, J., with whom were Warren, C.J. and Douglas, J., dissenting). A fourth Justice also dissented from the majority's holding that the successive prosecution of the defendant in Bartkus was permitted. Id. at 164 (Brennan, J., dissenting). Justice Black opined that "double prosecutions for the same offense are so contrary to the spirit of our free country ...." Id. Justice Black highlighted the historical underpinnings of his opinion:

> Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times. Even in the Dark Ages, when so many other principles of justice were lost,

the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers. By the thirteenth century it seems to have been firmly established in England, where it came to be considered as a "universal maxim of the common law." It is not surprising, therefore, that the principle was brought to this country by the earliest settlers as part of their heritage of freedom, and that it has been recognized here as fundamental again and again. Today it is found, in varying forms, not only in the Federal Constitution, but in the jurisprudence or constitutions of every State, as well as most foreign nations. It has, in fact, been described as part of all advanced systems of law and as one of those universal principles "of reason, justice, and conscience, of which Cicero said: 'Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is the same.'" While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same Act, and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them in two trials, the basic and recurring theme has always simply been that it is wrong for a man to "be brought into

> Danger for the same Offence more than once." Few principles have been more deeply "rooted in the traditions and conscience of our people."

Id. at 151-55.

The dual sovereignty doctrine, and the holding in United States v. Lanza, 260 U.S. 377, was also criticized in Abbate v. United States, 359 U.S. 187 (1959) (Black, J., with whom were Warren, C.J., and Douglas, J., dissenting) by the same Justices who dissented in Bartkus.[3] Justice Black pointed out that the holding in Lanza was based upon dicta from a number of past cases. Id. at 202. Justice Black stated, "These [past cases] had assumed that identical conduct of an accused might be prosecuted twice, once by a State and once by the Federal Government, because the 'offense' punished by each is in some, meaningful, sense different. The legal logic used to

[3] Bartkus and Abbate were companion cases.

prove one thing to be two is too subtle for me to grasp." Id.

Justice Black continued by stating that he did not believe that the State and the Nation could be considered two different sovereignties for the purpose of allowing them to do concurrently what neither could do on its own. Id. at 203. Justice Black explained his reasoning:

> In the first place, I cannot conceive that our States are more distinct from the Federal Government than are foreign nations from each other. And it has been recognized that most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction. In the second place, I believe the Bill of Rights' safeguard against double jeopardy was intended to establish a broad national policy against federal courts trying or punishing a man a second time after acquittal or conviction in any court. It is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to

> throw him in prison twice for the same offense.

Id.

The dual sovereignty doctrine has also been attacked in the Second Circuit. Judge Calabresi has stated that "the entire dual sovereignty doctrine is in need of serious reconsideration." United States v. All Assets of GPS Automotive Corp., 66 F.3d 483, 497 (2d Cir. 1995) (citing United States v. Grimes, 641 F.2d 96, 101 (3d Cir. 1981) (arguing that "a reexamination of [the dual sovereignty doctrine] may be in order")). In his analysis, Judge Calabresi noted:

> Since its very first application in Lanza, the dual sovereignty doctrine has been strongly criticized. See, e.g., J.A.C. Grant, The Lanza Rule of Successive Prosecutions, 32 Colum. L. Rev. 1309 (1932). The attacks on the doctrine increased sharply after the Supreme Court's decisions in Bartkus and Abbate. See, e.g., Walter T. Fisher, Double Jeopardy, Two Sovereignties and the Intruding Constitution, 28 U.Chi.L.Rev. 591 (1961); Lawrence Newman, Double Jeopardy and the Problem of

Successive Prosecution, 34 S.Cal.L.Rev. 252 (1961); George C. Pontikes, Dual Sovereignty and Double Jeopardy, 14 Case W.Res.L.Rev. 700 (1963). These criticisms, echoed and supplemented by more recent ones, have emphasized both the doctrine's weakness from an originalist point of view and its jurisprudential flaws. Thus, the doctrine has been called unfaithful to the Fifth Amendment's historical roots, see, e.g., Paul G. Cassell, The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine, 41 UCLA L.Rev. 693, 709-15 (1994), and has been chided for relying on a notion of federalism that is inconsistent with other Supreme Court holdings, see, e.g., Evan Tsen Lee, The Dual Sovereignty Exception to Double Jeopardy: In the Wake of Garcia v. San Antonio Metropolitan Transit Authority, 22 New Eng.L.Rev. 31 (1987). Nevertheless, despite these and many other criticisms, the doctrine as perdured.

United States v. All Assets of GPS Automotive Corp.,

66 F.3d at 497.

Judge Calabresi went on to discuss the historical perspective of the dual sovereignty doctrine and concluded that notwithstanding its history, "it becomes difficult to accept generalized statements of sovereign interests as justifying the [Double Jeopardy] Clause's inapplicability to successive prosecutions by different governments." Id. at 498.

Judge Calabresi then noted that perhaps the most important reason to reconsider the dual sovereignty doctrine was because of the dramatic changes that have taken place in the relationship between the federal government and the states since the Supreme Court decided Bartkus and Abbate. United States v. All Assets of GPS Automotive Corp., 66 F.3d at 498. Judge Calabresi noted that when those cases were decided, federal criminal law still had a very narrow scope, and the overlap between federal and state jurisdictions was quite small. Id. Judge Calabresi stated: "The risk to individual rights

posed by successive prosecutions by state and federal officials was therefore necessarily limited. Under such circumstances, it was not implausible to believe that these risks could be contained through prosecutorial rules, see Petite v. United States, 361 U.S. 529 ... (1960) ... and by the development of a significant and dynamic 'sham or cover' exception such as that which Bartkus, by negative implication, could be read to countenance." United States v. All Assets of GPS Automotive Corp., 66 F.3d at 498. However, recognizing that the scope of federal criminal law had expanded exponentially since the decisions in Bartkus and Abbate, Judge Calabresi stated that now the number of crimes for which a defendant may be made subject to both a federal and a state prosecution is "enormous." United States v. All Assets of GPS Automotive Corp., 66 F.3d at 498.

Judge Calabresi highlighted a Third Circuit decision, stating:

> As Judge Adams stated prophetically for the Third Circuit in United States v. Grimes, 641 F.2d 96 (3d Cir. 1981), at a time when the growth of federal criminal law had not yet reached its present extremes, "the recent expansion of federal criminal ... jurisdiction magnifies the impact of Bartkus and Abbate, thus rendering a reassessment of those decisions timely from a practical standpoint as well," since "permitting successive state-federal prosecutions for the same act [appears] inconsistent with what is a most ancient principle in western jurisprudence – that the government may not twice place a person in jeopardy for the same offense." Id. at 100-01.

United States v. All Assets of GPS Automotive Corp., 66 F.3d at 498-99.

Judge Calabresi finally pointed out that the United States Supreme Court has expressed a willingness to reconsider "supposedly well-settled landmarks of double jeopardy jurisprudence." Id. at 499 (citing United States v. Dixon, 509 U.S. 688 (1993) and Grady v. Corbin, 495 U.S. 508 (1990)). Judge Calabresi also noted, "And the Supreme

Court's decision ... in United States v. Lopez, 514 U.S. 549 ... (1995), has similarly revealed the Court's willingness to give serious and renewed thought to issues of federalism at the foundation of our constitutional system, and to do so in the context of the enormous expansion of federal criminal law." United States v. All Assets of GPS Automotive Corp., 66 F.3d at 499. Judge Calabresi concluded, "In that light, a new look by the High Court at the dual sovereignty doctrine and what it means today for the safeguards the Framers sought to place in the Double Jeopardy Clause would surely be welcome." Id.

As Judge Calabresi pointed out, the Third Circuit, in United States v. Grimes, 641 F.2d 96 (3d Cir. 1981) also criticized the dual sovereignty rule. The Third Circuit pointed out that, according to the U.S. Supreme Court, the Double Jeopardy Clause secured three interests: "It protects against a second prosecution for the same offense after acquittal. It

protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." Id. at 100 (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). The Third Circuit then noted, "Allowing either a state or the federal government to prosecute an individual after the other jurisdiction has tried him for the same act appears to infringe these three concerns which the Double Jeopardy Clause is designed to protect." Id.

The Third Circuit then called for a reexamination of Bartkus, "since questions may be raised regarding both the validity of this formalistic conception of dual sovereignty and the continuing viability of the opinion's interpretation of the Double Jeopardy Clause with respect to the states." Id. at 101. "Moreover, the recent expansion of federal criminal law jurisdiction magnifies the impact of Bartkus and Abbate, thus rendering a reassessment of

those decisions timely from a practical standpoint as well." Id. The court noted:

> First, an important predicate of the Bartkus opinion that the Fifth Amendment Double Jeopardy provision does not bind the states has been undercut by subsequent constitutional developments. Benton v. Maryland, 395 U.S. 784 ... (1969), unqualifiedly weakens the theoretical basis of Bartkus, namely that states are not bound to follow the federal constitutional interpretation of the Double Jeopardy Clause. The rationale of Benton also may diminish the practical reasoning underpinning the Bartkus opinion: that states are the most competent authorities to deal with the problem of double jeopardy insofar as its proper solution depends on the scope of the ban against reprosecution that has been historically granted in the state. See [Bartkus,] 359 U.S. at 137-38.

United States v. Grimes, 641 F.2d at 101-02.[4]

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[4] There has been much criticism of the dual sovereignty doctrine within academic circles as well. See, e.g., Akhil R. Amar & Jonathan L. Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1, 2 (1995) (proposing "to abandon the general dual sovereignty doctrine in double jeopardy law"); Richard D. Boyle, Double Jeopardy and Dual

Sovereignty: The Impact of Benton v. Maryland on Successive Prosecutions of the Same Offense by State and Federal Governments, 46 Ind. L.J. 413 (1971); Daniel A. Braun, Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism, 20 Am. J. Crim. L., 36 (1992) (arguing that the dual sovereignty exception is theoretically flawed); Eric J. McDonald Guadalupe, Double Jeopardy, Dual Sovereignty and Other Legal Fictions, 28 Rev. Jur. U.I.P.R. 201 (1994) (analyzing the dual sovereignty exception in the American criminal justice system and arguing that it is unconstitutional); Sandra Guerra, The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy, 73 N.C.L. Rev. 1159, 1161-62 (1995) (arguing that the "dual sovereignty exception violates the spirit, if not the letter, of the Double Jeopardy Clause"); Susan N. Herman, Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU, 41 UCLA L. Rev. 609, 618 & n.32 (1994) (collecting a dozen law review articles and notes published since 1930 criticizing the dual sovereignty exception); Paul Hoffman, Double Jeopardy Wars: The Case for a Civil Rights "Exception", 41 UCLA L. Rev. 649, 661-71 (1994) (arguing for the abolition of the dual sovereignty doctrine, with an exception for civil rights cases);
Kenneth M. Murchison, The Dual Sovereignty Exception to Double Jeopardy, 14 N.Y.U. Rev. L. & Soc. Change 383 (1986); Michael A. Dawson, Note, Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine, 102 Yale L.J. 281, 282 (1992) (arguing that "[t] he dual sovereignty doctrine is unconstitutional because it denigrates the principle of popular sovereignty underlying the Double Jeopardy

The criticism of the dual sovereignty doctrine also comports with the principles of comity and federalism. Because of the increasing centralization of federal criminal power, the dual sovereignty doctrine has caused unintended problems vis a vis constitutional rights, which is illustrated by recent decisions of the United States Supreme Court.

For example, in United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000), the Supreme Court struck down as unconstitutional Congressional acts under the third

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Clause"); Kevin J. Hellmann, Note, The Fallacy of Dueling Sovereignties: Why the Supreme Court Refuses to Eliminate the Dual Sovereignty Doctrine, 2 J.L. & Pol'y 149, 153 (1994) (asserting that the continuing allowance of successive prosecutions by a state and federal government "does not help to achieve the goals of criminal justice"); James E. King, Note, The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution, 31 Stan. L. Rev. 477 (1979); Note, Double Prosecution by State and Federal Governments: Another Exercise in Federalism, 80 Harv. L. Rev. 1538 (1967).

prong of the Commerce Clause – i.e., statutes that are not on their face aimed at either the channels or instrumentalities of commerce but which attempt to regulate commerce on the basis of the allegedly cumulative effect on the otherwise local activities at issue in interstate or foreign commerce. United States v. Lopez, 514 U.S. at 567 (provision of Gun Free School Zones Act making it a federal crime to possess a firearm in a school zone exceeded Commerce Clause power because the statute had "no requirement that [the defendant's] possession of the firearm have any concrete tie to interstate commerce"); United States v. Morrison, 529 U.S. at 618 (provision of the Violence Against Women Act providing for a civil penalty exceeded Commerce Clause power because "[t]he Constitution requires a distinction between what is truly national and what is truly local").

It is apparent that the Supreme Court was concerned that a federal criminal prosecution must be

based on more than an incidental connection to interstate commerce. See United States v. Lopez, 514 U.S. at 555-57; United States v. Morrison, 529 U.S. at 618. As discussed supra, Judge Calabresi of this Circuit noted that the Lopez decision "has similarly revealed the Court's willingness to give serious and renewed thought to issues of federalism at the foundation of our constitutional system, and to do so in the context of the enormous expansion of federal criminal law." United States v. All Assets of GPS Automotive Corp., 66 F.3d at 499. In accordance with the recent trend away from unnecessarily federalizing state law issues, the dual sovereignty doctrine should be found unconstitutional.

CONCLUSION

This Court should accept the invitation to give a fresh look at the dual sovereignty doctrine. The instant case should not have proceeded without a

reexamination of these principles and a determination that the dual sovereignty doctrine has not survived the sea of changes described supra.

For all of the foregoing reasons, this Court should reverse the decision of the district court denying the Defendant's Motion to Amend/Correct Judgment and should find that the prosecution of the Defendant is unconstitutional.

Respectfully submitted,

By /s/

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Certification

THIS IS TO CERTIFY that a copy of the foregoing **DEFENDANT-APPELLANT'S BRIEF** has been sent to the Clerk of the United States Court Of Appeals For The Second Circuit by Federal Express, next day mail, postage prepaid on this 10th day of February, 2009.

THIS FURTHER CERTIFIES that a copy of the foregoing **DEFENDANT-APPELLANT'S BRIEF** has been sent to the following counsel of record by Federal Express, next day mail, postage prepaid, on this 10th day of February, 2009:

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/s/
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